

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

original

77-4077

To be argued by
RICHARD J. LEON

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-4077

LUC AVRIL and MARIE TELICIA AVRIL,
Petitioners,
—against—

IMMIGRATION and NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF AND ADDENDUM FOR RESPONDENT

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for Respondent.

RICHARD J. LEON,
THOMAS H. BELOTE,
Special Assistant United States Attorneys,
Of Counsel.

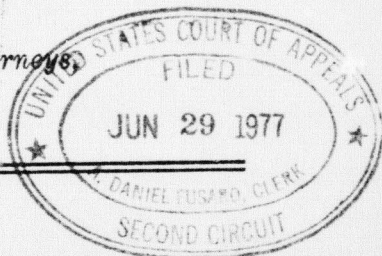


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LUC AVRIL and MARIE TELICIA AVRIL,
Petitioners,
—against—

IMMIGRATION and NATURALIZATION SERVICE,
Respondent.

BRIEF FOR RESPONDENT

Preliminary Statement

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act") 8 U.S.C. of 1105a, Luc and Marie Avril (the "Avrils") petition this Court for review of the decision of the Board of Immigration Appeals (the "Board") on October 28, 1976 refusing to reopen their deportation proceedings so that they could apply for the extraordinary discretionary relief of suspension of deportation under Section 244(a) of the Act, 8 U.S.C. § 1254(a). The Avrils contend that the Board's decision should be reversed because its refusal to reopen their deportation proceedings constitutes an abuse of discretion.

Issue Presented

Whether the Board of Immigration Appeals abused its discretion by refusing to reopen the petitioners' deportation proceedings.

Statement of the Facts¹

On May 12, 1968, the Avrils,² natives and citizens of Haiti, entered the United States at Miami, Florida as non-immigrant visitors for pleasure³ with permission to remain in this country until May 19, 1968. (AR 11). They failed to depart as required however, and proceeded instead to New York, settling ultimately in Brooklyn. (AR 5).

In October 1968, the Avrils were located and apprehended by agents of the Service. The Service immediately commenced deportation proceedings against them on October 10, 1968 by issuing and serving each with an Order to Show Cause and Notice of Hearing. (AR 26 and 27). These orders charged the Avrils with violating Section 241(a)(2) of the Act, 8 U.S.C. § 1252 (a)(2), by remaining in this country without authority.

On October 21, 1968, the Avrils appeared at the Service's New York City Office for their deportation hearing before Immigration Judge Henry Millman. (AR 36). During the proceeding both Luc and Marie conceded their deportability (AR 21) and asked Judge Millman to grant them the discretionary privilege of voluntary departure⁴ or withholding of their deportation under

¹ References in this brief preceded by the letters "AR" are to the certified administrative record previously filed with this Court.

² Luc and Marie were married in Port au Prince, Haiti on January 31, 1959. (AR 5). Neither of them have any relatives in the United States and they have never had any children. (AR 5-9). Luc is forty-three years old and Marie is forty-six years old. (AR 5-9).

³ Non-immigrant visitor for pleasure is defined in Section 101(a)(15)(B) of the Act, 8 U.S.C. § 1101(a)(15)(B).

⁴ See Section 244(e) of the Act, 8 U.S.C. § 1254(e), and 8 U.S.C. § 244. This relief can be granted if the alien establishes that he is willing and has the immediate means with which to depart promptly from the United States. If granted, it removes the stigma of an order of deportation from the alien's record and thus facilitates any future lawful reentry into this country which he might wish to make. See Section 212(a)(17) of the Act, 8 U.S.C. 1182(a)(17).

Section 243(h) of the Act, 8 U.S.C. § 1253(h).⁵ In order for them to have an opportunity to more fully present their application withholding of deportation, Judge Millman adjourned the hearing until December 10, 1968. (AR 36). A further adjournment until February 14, 1969 was subsequently granted. (AR 36).

When their deportation hearing was completed, Judge Millman issued a written decision on October 9, 1969 finding the Avrils deportable. (AR 21-25). Based on

⁵ Section 243(h) of the Act, 8 U.S.C. § 1253(h) permits the Attorney General, in his discretion, to withhold deportation of any alien in the United States to any country in which "in his opinion the alien would be subject to persecution on account of race, religion or political opinion." See *Muscardin v. Immigration and Naturalization Service*, 415 F.2d 865, 866 (5th Cir. 1969). The Attorney General has delegated this responsibility to the Immigration Judge, 8 C.F.R. § 242 and to the Board of Immigration Appeals, 8 C.F.R. § 302.

To be eligible for consideration under the provisions of Section 243(h) of the Act, an alien must submit an application to the Immigration Judge at his deportation hearing which requests this relief and sets forth the reasons why it should be granted. See 8 C.F.R. § 242.17(c). The alien has the burden of proof to demonstrate that his application warrants favorable consideration. 8 C.F.R. § 242.17(c); *Chen v. Foley*, 385 F.2d 929, 934 (6th Cir. 1967), *cert. denied*, 393 U.S. 838 (1968); *Khalil v. Immigration and Naturalization Service*, 457 F.2d 1276, 1277 (9th Cir. 1972). In the context of Section 243(h), the alien is not only required to show a *clear probability* of persecution in the country designated for his deportation, but also that this persecution would result solely from religious, racial or political reasons. *Cheng Kai Fu v. Immigration and Naturalization Service*, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968). A mere showing of persecution in a particular country, without substantial proof as to the reasons behind the persecution or its relationship to the applicant, is insufficient to warrant favorable discretionary action under Section 243(h). *Paul v. Immigration and Naturalization Service*, 521 F.2d 199, 199-201 (5th Cir. 1975); *Zamora v. Immigration and Naturalization Service*, 534 F.2d 1055, 1063 (2d Cir. 1976).

their representation that they were financially able and willing to voluntarily depart promptly from the United States and finding them statutorily eligible for this discretionary relief, Judge Millman granted their request for voluntary departure. (AR 21-22).

With respect to withholding of deportation however, Judge Millman denied their request. The Avrils had attempted to meet their burden⁶ of demonstrating a clear probability that they would each be individually persecuted upon returning to Haiti by relying on generalized characterizations of the political climate in Haiti and the allegation that Luc's brother, Marcel, had been so involved in political activities opposing the present government that he had to leave Haiti in 1961 to avoid persecution. (AR 22-23). Judge Millman, after analyzing their testimony and evidence, found that the Avrils failed to meet their burden because: (1) neither Luc nor Marie had ever been personally involved in politics while in Haiti, (2) neither they nor their family had ever been persecuted by the government either before or after Marcel's exodus in 1961, and (3) the testimony of the Avrils at their hearing, as well as the corroborative letters of Marcel submitted as evidence, were "not sufficiently convincing to establish the [Avrils] claim to persecution." (AR 24). Consequently, Judge Millman entered an order permitting the Avrils to depart voluntarily within 30 days and an alternative order of deportation which would go into effect if they failed to depart voluntarily. (AR 25).

Despite their representations to the Immigration Judge of their willingness and ability to depart, they did not leave the country pursuant to the order of October 9, 1969. Instead, they left New York City, without notifying the Service, and moved to West Redding, Con-

⁶ See note 5 *supra*.

necticut where they accepted jobs as caretakers⁷ for Mrs. Elmo Roper who provided them with room, board, and a weekly salary. (AR 5). As a result of their non compliance, Judge Millman's alternative order of deportation went into effect and a warrant of deportation was issued against the Avrils on January 19, 1970.

Five months after their promised date of departure the Avrils were located by agents of the Service. (AR 16). However, by that time the first of three private bills had been introduced by a United States Senator from Connecticut into the Senate seeking to grant the Avrils permanent resident status. (AR 16). A stay of deportation was granted by the Service pending Senate action on each of the bills. It was not until the final bill, introduced in 1973, was rejected by the Senate on September 26, 1974 that these continual stays of deportations elapsed. (AR 16). Consequently, the Service notified the Avrils on February 6, 1975 to report for deportation on February 19, 1975.

On February 14, 1975, five days prior to their scheduled departure, the Avrils initiated a new series of administrative actions in an attempt to prolong their stay in this country. They submitted to the Service's Hartford Office a motion to reopen their deportation proceedings for the purpose of: (1) reinstating voluntary departure, (2) staying their deportation, and (3) reconsidering the previous denial of their application for withholding of deportation. (AR 18). In their motion the Avrils alleged that "many new events [had] occurred

⁷ The only evidence in the record regarding the actual responsibilities of Luc and Marie is a letter from the physician of their employer, Mrs. Elmo Roper. This letter, appearing at page 7 of the petitioner's appendix, was submitted by the Avrils in August of 1975 together with their application for suspension of deportation. See note 11 *infra*. Apparently, Mrs. Roper depends exclusively upon the Avrils to manage her home and provide for her daily care.

which confirm and corroborate [their] fear . . . of returning to Haiti." (AR 18). To substantiate this claim they submitted with their motion: (1) a statement prepared by Luc relating to alleged incidents of oppression which caused his fear of returning (AR 28), (2) clippings from the "Haiti Observer", a newspaper written in French (AR 29), and (3) an article written in French relating to the perils of the Haitian Consul in Canada. (AR 30).

Since the mere filing of a motion to reopen does not stay an alien's deportation, 8 C.F.R. § 242.22,⁸ the Avrils proceeded to the United States District Court in New Haven, Connecticut on February 18, 1975 in an eleventh hour attempt to obtain a stay of their deportation.⁹ United States District Judge Robert C. Zampano, after noting the potential administrative ramifications and abuses that their extended presence in this country could facilitate,¹⁰ stated that he was hesitant ". . . to issue

⁸ Cf. *Cheng Kai Fu v. Immigration and Naturalization Service*, 386 F.2d 751, 753 (2d Cir. 1967), cert. denied, 396 U.S. 2003 (1968); *Acevedo v. Immigration and Naturalization Service*, 538 F.2d 918, 920 (2d Cir. 1976). "A mere blanket motion unaccompanied by such an offer of proof, does not meet this requirement or call for reopening of deportation proceedings. 'If such were the law, all deportations could be permanently frustrated by the mere filing of successive petitions to reopen.'" *Id.*

⁹ Included as an addendum to our brief is the official transcript of the proceedings before United States District Judge Robert C. Zampano. All references preceded by the letters "Tr." refer to that transcript.

¹⁰ Judge Zampano was informed by the Government's attorney at this proceeding that if the Avrils managed to remain in this country until May, 1975, they will have acquired the minimum statutory requirement of physical presence (seven continuous years) to enable them to apply for the discretionary relief of suspension of deportation under Section 244(a) of the Act, 8 U.S.C. § 1254(a) (Tr. 20a). Since it would be necessary for them to have their deportation proceedings reopened before they could apply for this relief, Judge Zampano realized that once eligibility was obtained, numerous administrative hearings and appeals could ensue, further delaying the Avrils' deportation.

a broad motion to stay . . ." but would grant a stay ". . . pending the Immigration Judge's ruling on [the Avrils'] pending motion before him." (Tr. 20a). Moreover, Judge Zampano added:

"Mr. Arcudi [petitioners' counsel at that time] has said to the Court, 'I just want an opportunity to be heard before the Immigration judge.' So I am saying, in effect, O.K., I'll give you that opportunity, but *if you are going to use my order to go off on some other administrative channels that involve another whole set of circumstances not before the Court, I am not going to allow that.* I think justice will be done. Because then the Immigration judge will then have the opportunity to determine whether in fairness and in justice *he* should issue a stay after he examines your moving papers. Or, if he doesn't, then you have the Immigration Department to seek help from." (emphasis added). (Tr. 20a-21a).

Six weeks later, April 4, 1975, Immigration Judge Eugene C. Cassidy, after reviewing the motion and supporting papers submitted by the Avrils denied their motion "in its entirety". (AR 14). In his opinion Judge Cassidy found that the evidentiary accounts of political persecution submitted did not relate to the Avrils' as individuals and concluded that the motion "clearly . . . has no purpose but to further delay the well merited and long delayed departure of the [Avrils]." (AR 13). The Avrils waited three weeks thereafter before appealing that decision to the Board on April 23, 1975. (AR 41). On June 2, 1975, the Board, like Judge Cassidy, found that the Avrils had failed to show a *prima facie* case for withholding of deportation under Section 243(h) and therefore denied the Avrils appeal. (AR 9-10).

Undaunted by this set back and having accrued six more months of physical presence in this country, the

Avrils initiated the very administrative actions Judge Zampano had earlier warned them he would not allow. On August 11, 1975 the Avrils submitted to the Service's Hartford Office their applications¹¹ for suspension of deportation under Section 244(a) of the Act.¹² (AR 5-9). They did not, however, submit the requisite motion and supporting evidentiary proof to reopen their deportation proceedings under 8 C.F.R. § 3.2 and 103.5. Finally, on September 17, 1976, the Service's Hartford Office, apparently realizing that these motions were not forthcoming and desirous of adjudicating the Avrils' applications without further delay, forwarded the Avrils' applications and record files to the Board for it to determine whether or not their deportation proceedings should

¹¹ Petitioners submitted with their applications a letter from their employer's physician and a letter from Luc's personal physician dated March 15, 1975 addressed to the Avril's attorney (AR 58) who represented them before Judge Zampano on February 18, 1975. It is curious, at best, why that attorney, having represented that he did not intend to use Judge Zampano's stay as a means to acquire the necessary statutory requirement for suspension of deportation, would seek that type of information from Luc's physician at that point in time and that the Avrils' present attorney (AR 38) submitted it subsequently with their applications for that relief.

¹² Section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1) provides that the Attorney General, through the Service, may suspend the deportation of an alien who, inter alia, has been "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of [his] application, . . . and is a person whose deportation would . . . result in extreme hardship to the alien or to his spouse, parent or child, who is a citizen of the United States or lawfully admitted resident alien. . . . To be eligible for this relief, an alien has the burden of proving compliance with these provisions. *Rassano v. Immigration and Naturalization Service*, 492 F.2d 220 (7th Cir. 1974); *Ex parte Orlando*, 131 F. Supp. 485 (S.D.N.Y.), *aff'd*, 222 F.2d 537 (2d Cir.), *cert. denied*, 350 U.S. 862 (1954).

be reopened to allow them to apply for suspension of deportation.¹³

Treating their applications as motions to reopen, the Board, relying on its previous decision in *Matter of Cipus*, Interim Decision, 2172 (B.I.A. 1972), held in a written opinion issued on October 28, 1976 that the Avrils had failed to submit any material evidence to establish a *prima facie* case for reopening. In fact, the Board noted that their applications merely indicated that they had achieved the minimum statutory period of continuous physical presence. Accordingly, the Board refused to reopen their proceedings.

The Avrils were ordered by the Service to surrender for deportation on January 31, 1977. As in the past, they ignored this notification. On March 23, 1977 they filed a petition for review in this Court seeking to set aside the Board's decision refusing to reopen their proceedings. Consequently, the Avrils have remained in the

¹³ When an order of deportation is entered against an alien by an Immigration Judge it is final unless an appeal is taken from that decision to the Board or the case is certified to the Board. 8 C.F.R. 242.20. The Attorney General has provided regulations however that permit the alien to submit a motion for the discretionary reopening of his proceedings. 8 C.F.R. 3.2, 103.5, and 242.22.

Normally the alien's motion to reopen and accompanying papers are submitted to the Service's District Director in whose district the proceeding was conducted for transmittal to the Immigration Judge having jurisdiction over the proceeding. 8 C.F.R. § 103.5. However, once the Board of Immigration Appeals renders a decision on the alien's case, jurisdiction vests in the Board and all motions to reopen must be addressed to the Board. 8 C.F.R. § 3.2. Compare 8 C.F.R. § 242.22. See *Matter of Mladineo*, 14 I & N Dec. 591 (BIA. 1974).

Since the Board rendered a decision on June 2, 1975 (AR 9) denying the Avrils appeal from Immigration Judge Cassidy's denial of their first motion to reopen their proceedings (AR 11), the Avrils under 8 C.F.R. § 3.2 were required to address this second motion to reopen their proceedings to the Board.

United States pursuant to the automatic statutory stay of deportation which accompanies every petition for review filed pursuant to Section 103(a)(3) of the Act, 8 U.S.C. § 1105(a)(3).

Relevant Statutes

Immigration and Nationality Act, 63 Stat. 163 (1952)
as amended:

Section 243, 8 U.S.C. § 1253——

* * * * *

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

Section 244, 8 U.S.C. § 1254——

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and——

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose de-

portation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

* * * *

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of Section 1251(a) of this title . . . to depart voluntarily from the United States at his own expense in lieu of deportation as such alien shall establish to the satisfaction of the Attorney General that he is, or has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

* * * *

Relevant Regulations

Title, 8, Code of Federal Regulations (C.R.R.) § 3.2

3.2 Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . .

3.8 Motion to reopen or motion to reconsider.

(a) Form. Motions to reopen and motions to reconsider shall be submitted in triplicate. A request for oral argument, if desired, shall be incorporated in the motion. The Board in its discretion may grant or deny oral argument. Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent . . .

§ 242.17 Ancillary matters, applications

(c) Temporary withholding of deportation. * * * The respondent shall be advised that pursuant to Section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion or political opinion as claimed. * * *

§ 242.22 Reopening or reconsideration.

Except as otherwise provided in this section, a motion to reopen or reconsider shall be subject to the requirements of § 103.5 of this chapter.* The special inquiry officer may upon his own mo-

tion, or upon motion of the trial attorney or the respondent, reopen or reconsider any case in which he has made a decision, unless jurisdiction in the case was vested in the Board under Part 3 of this chapter. In order by the special inquiry officer granted. A motion to reopen may be made on Form I-328. A motion to reopen will not be granted unless the special inquiry officer is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing; . . .

ARGUMENT

The Board Of Immigration Appeals Did Not Abuse Its Discretionary Authority By Refusing To Reopen The Deportation Proceedings Of The Avrils.

A. The Reopening of a Deportation Proceeding is a Matter of Discretion

The Immigration and Nationality Act contains no specific provisions for the reopening of a deportation proceeding. The Attorney General, under his broad grant of authority to administer and enforce the Act,¹⁴ has promulgated regulations which permit reopening or reconsideration of prior decisions as a matter of discretion provided certain criteria are met. The applicable regulation, 8 C.F.R. § 3.2, provides in pertinent part that motions to reopen or reconsider "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered at the prior hearing." Additionally, 8 C.F.R. § 3.8 provides that "motions to

¹⁴ Section 103(a) of the Act, 8 U.S.C. § 1103(a).

reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material." See also 8 C.F.R. § 242.22.

Obviously, the regulations contemplate that a motion to reopen or reconsider a prior decision shall contain an offer of evidence, that the evidence offered shall have been heretofore unobtainable, and that the evidence if accepted would be sufficient to warrant the granting of the relief sought. Accordingly, the Board is required to evaluate any such offer of evidence against the background of the record already compiled in the alien's case. When such evidence, even if accepted as true, would not justify a grant of the ultimate relief sought, it is obvious that no purpose would be served by reopening the proceeding. With this in mind, we now turn to examine the nature of the relief sought by this petitioner and the evidence he offered.

B. Suspension of Deportation

Suspension of deportation pursuant to Section 244(a) of the Act, 8 U.S.C. § 1254(a), is the ultimate form of relief available to a deportable alien. An alien whose application is approved has his deportability cancelled and obtains status adjustment to that of a permanent resident without having to leave the United States. Authority to grant or deny this relief is vested within the sound discretion of the Attorney General. *Hinopoulos v. Shaughnessy*, 353 U.S. 72 (1957). Those applications which are approved by the Attorney General must be referred to the Congress for final legislative approval. Section 244(c) of the Act, 8 U.S.C. § 1254(c); *McGrath v. Kristensen*, 340 U.S. 162 (1950).

In order to qualify for suspension of deportation, an alien must first satisfy certain objective requirements

contained in the statute. He must establish that he has been physically present in the United States for at least seven consecutive years immediately preceding his application, and that he had been a person of good moral character during that period. He must also convince the Attorney General that his deportation would result in extreme hardship to himself or to a close relative who is a citizen or resident alien of this country.

The applicant for suspension of deportation has the burden of showing that he meets these prescribed conditions. 8 C.F.R. 242.17(d); *Kimm v. Rosenberg*, 363 U.S. 405 (1960), *rehearing denied*, 364 U.S. 854; *Brownell v. Cohen*, 250 F.2d 770 (D.C. Cir. 1957). If he fails to establish statutory eligibility, the application must be denied as a matter of law. Attainment of the statutory minimum, however, does not mean that relief will be automatically granted. The alien who satisfies the statutory requirements still has the burden of convincing the Attorney General that he merits the favorable exercise of discretion. *Hintopoulos v. Shaughnessy*, *supra*; *Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715 (2d Cir. 1966); *Ng v. Piliiod*, 279 F.2d 207 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961). Accordingly, when making their motion to reopen or their motion to reconsider it was incumbent upon the Avrils to offer evidence to show not only that they were statutorily eligible but that they merited the extraordinary relief they sought as a matter of discretion.

C. The Record in this Case Demonstrates That The Board Did Not Abuse Its Discretion By Refusing To Reopen Petitioners' Deportation Proceedings.

As discussed previously, the Board refused to reopen the Avrils' deportation proceedings because they failed to introduce any evidence demonstrating their eligibility

for suspension of deportation other than their achievement of the minimum statutory period of continuous physical presence. In this action the Avrils contend that the Board's decision should be reversed because it constitutes an abuse of discretion. A review of the facts contained in the Avrils' application for suspension of deportation, in light of the limited standard of review, demonstrates the propriety of the Board's discretionary decision.

(1) Standard of Review

In reviewing an exercise of discretionary authority the scope of judicial review is extremely narrow. Accordingly it precludes this Court from substituting its judgment for that of the Board unless the determination is found to be without any rational explanation, to depart inexplicably from established practices, or rest on an impermissible basis. *Wong Wing Hang v. Immigration and Naturalization Service, supra; Ex parte Orlando, supra.*

(2) In the Absence of Sufficient Supporting Evidence the Board's Decision Refusing to Reopen The Petitioners' Deportation Proceedings Was Proper

The Avrils' application for suspension of deportation, in effect, stated that they had achieved the minimum requisite seven years of physical presence in the United States and that they were persons of good moral character. In order to have sufficiently demonstrated to the Board a *prima facie* case for reopening, they had to allege and support by evidentiary material that their deportation would result in extreme hardship to themselves or to a spouse, child, or parent who is a United

States citizen or an alien lawfully admitted for permanent residence. Acknowledging that they have no children or immediate relatives (i.e. parent) in this country and failing to state any equities whatsoever, the Avrils attempted to show *personal* hardship by reasserting their fear of persecution upon returning to Haiti and by submitting a letter from Luc's doctor as evidence of a medical hardship. Additionally, they submitted a letter from their employer's physician as evidence of the hardship the employer would shoulder if they left the country. For the following reasons the Board properly concluded that the Avrils failed to meet their burden and therefore properly refused to reopen their deportation proceedings.

First, with respect to any possible hardship that might befall their employer, Section 244 of the Act, 8 U.S.C. § 1254, is specifically limited to hardship that will be suffered by the deportable aliens personally and or their immediate relatives (i.e. parents, children, spouses) who are either United States citizens or lawful permanent resident. The petitioner does not cite any authority for the proposition that the hardship requirement under Section 244 encompasses hardship to a non related United States citizen employer and, in fact, there is no such authority. Clearly, this extraordinary discretionary relief was intended by Congress to remedy the hardship that deportation would create by dividing families that have established "deep roots in our soil". Gordon and Rosenfield, *Immigration Law and Procedure*, Section 7.9a at 780.4 (Rev. ed. 1976). To extend the clear wording and familial classes enumerated by Congress to include non related employers of aliens, would not only defeat the purpose of this section of the act, but encourage employers to utilize this section as a loophole to legitimize their use of illegal alien employees.

Second, the Avrils' attempt to claim fear of persecution as a basis for their alleged personal hardship upon

departing is both inapplicable and inappropriate. Congress specifically enacted Section 243(h) of the Act, 8 U.S.C. § 1253(h) to empower the Attorney General to withhold the deportation of those who would be persecuted upon returning to their native land. The Avrils having unsuccessfully attempted on two prior occasions to acquire relief under Section 243(h) can not now base their claim to suspension of deportation on this apprehension in an effort to indirectly achieve their desire to remain in this country.

Finally, Luc's apparent contention that his previous physical problems would constitute a medical hardship if deported is, at best, unconvincing. The letter he submitted from his doctor, dated five months *prior* to his application for suspension, was the sole basis for his claim of medical hardship. The letter itself merely states that Luc should remain under medical observation for six months to a year apparently because of a *possible* need for lumbar disc surgery. There is nothing to indicate that his back problems have hampered his working ability, would be aggravated by relocation to Haiti, or could only be safely treated in this country. In fact it appears that Luc has continually worked since the inception of his physical problems, and provided valuable services to his employer.¹⁵ To say the least, Luc's physical problems do not constitute the type of extreme hardship contemplated by Section 244(a) of the Act, 8 U.S.C. § 1254(a).

Considering the tangential, inapplicable and unsubstantial nature of the limited information submitted by

¹⁵ In his application for suspension of deportation, Luc states that he is still employed by Mrs. Roper. (AR 7). Surely it is inconceivable that a woman as dependent upon assistance as Mrs. Roper would or could desire to continue to retain the services of an employee physically incapable of giving her assistance.

the Avrils to support their application for the extraordinary discretionary relief of suspension of deportation, the Board's decision to refuse to reopen their deportation proceedings was not an abuse of discretion.

CONCLUSION

The petition for review should be dismissed.

Dated: New York, New York
June 20, 1977

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Respondent.*

RICHARD J. LEON,
THOMAS H. BELOTE,
*Special Assistant United States Attorneys,
Of Counsel.*

ADDENDUM

1a

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
Civil Action No. N-75-38

LUC AVRIL and MARIE TELICIA AVRIL,
Plaintiffs,

—versus—

JAMES E. SMITH, District Director, Immigration
& Naturalization Service,
Defendant.

United States Court House
New Haven, Connecticut
February 18, 1975

Before: HON. ROBERT C. ZAMPANO,
U. S. D. J.

APPEARANCES:

JOHN A. ARCUDI, Esq.
Attorney for the Plaintiffs
285 Golden Hill Street
Bridgeport, Connecticut

PETER MEAR,
Asst. U. S. Attorney
U. S. Court House
New Haven, Connecticut

THE COURT: Mr. Arcudi, it's your order to show cause. The one matter that came to mind that was not raised in the moving papers is my concern, which may have a relatively easy explanation, that no reasons were set forth in the notice to the petitioners for the denial. Under the regulations isn't that a requirement? Were you notified orally or do you have some other writing?

MR. ARCUDI: Well, if your Honor pleases, this case, the original order of deportation was entered in 1969 and at that point there was a hearing with a written decision, and that order was stayed, but because of the various bills introduced by Senator Ribicoff, and when finally the third bill introduced by the Senator got an unfavorable committee report, then the order of deportation which had been entered in 1969 with a written decision with reasons was invoked. So that this order for the February 19th departure relates back to an order that stood in status quo for six years, and there were no reasons with this order, but it relates back to the deportation finding in '69. I think that's what the Court is referring to.

THE COURT: Yes. For example, in several cases the Court in the statement of facts recites words to the effect that the Special Inquiry Officer recommended a denial of appellant's application on the ground that the petitioner had failed to establish that he would be subject to physical persecution if deported to a certain country.

MR. ARCUDI: That was in '69.

THE COURT: I see.

MR. MEAR: Your Honor, I have a copy of the '69 report, if it's appropriate to give it to you now.

THE COURT: Yes. I think it would be useful to have that as part of the moving papers.

MR. ARCUDI: I'm sorry that I didn't include it. I assumed the Government would have filed it with the record.

THE COURT: As long as you cleared it up, why don't we start out by having that admitted.

Now, Mr. Arcudi, you want to move for a stay pending further administrative procedures that you wish to follow?

MR. ARCUDI: That's correct, your Honor. I had filed them and I attached them to my moving papers, and I would also like to submit a brief at this time.—I have given a copy to the Government—on the basic issues here. It's just a short brief.

THE COURT: Isn't there another troublesome aspect to these regulations? I don't pretend to be an expert on this, but if there isn't a stay, then isn't your motion to reconsider deemed waived?

MR. ARCUDI: That's correct, your Honor. I make that reference in Paragraph 9, 10 and 11 of my application. 8 CFR 109.5 and 8 CFR 3.2, those two sections taken together state, first of all, that our motion to reconsider doesn't automatically stay the deportation. And then 8 CFR 3.2 states that if there is a departure from the United States pending such a motion, then the motion is considered automatically withdrawn. Which means that if we do have any substantive argument to make on this reopening, that it will never be considered if the deportation is carried.

THE COURT: Now, what are you seeking from this Court?

MR. ARCUDI: I'm seeking a stay in order to pursue our motion to reopen and our motion to consider before the administrative tribunal on the basis of the new evidence in order to let the administrative tribunal have an opportunity to have that heard and in order to exhaust our administrative processes on the new evidence that we claim has occurred since 1969, since the decision that has just been made an exhibit here.

I claim that, under my administrative request, which was filed last week, was—that under 8 U.S.C. 1253(h) there is a provision that the Government will not deport an alien to a country where he is in danger of political persecution. That issue was raised in 1969 before the Immigration judge, then the Special Inquiry Officer in 1969, and he held that there wasn't sufficient evidence for him so to rule in the case of these two aliens.

I have moved to reopen that particular request and ask that it be reconsidered because, since 1969 I have shown five instances of oppression of the Haitian political regime and want an opportunity to present that evidence and to present other evidence before the Immigration judge in a reopened proceeding to have him reconsider relief, withholding deportation under 343(h).

THE COURT: All right. Now, based on your knowledge and experience—and, of course, I will address the same question to Mr. Mear—what is the time schedule that you anticipate for you to proceed the way you wish? I mean, are we talking years, are we talking weeks or days or what?

MR. ARCUDI: We're talking months, I would think, on the administrative process. The first administrative level is the Immigration judge, and that should be heard within a matter of six weeks to two months, I think, with the schedule of Judge Cassidy in Hartford being what it is. And then there's another administrative level, the Board of Immigration Appeals, which would take another four to seven months after that, if there is an appeal from a decision of Judge Cassidy by either party to the Board of Immigration Appeals.

So the administrative process is a process that I would estimate to take no longer than eight months on the basis of what's been happening.

THE COURT: What is their present situation? What are they doing, where are they located, and so forth?

MR. ARCUDI: I have filed a motion to reopen which is now in Hartford. Under the rules, since the original case was heard in New York, I had to file in New York, but those same rules provide that it be immediately transferred to the district of the Immigration Service which has territorial jurisdiction over the alien, and that is Hartford. So now, at Hartford, there is my motion for reopening and reconsidering on the basis of this new evidence, our 8 USC 1253(h) application.

THE COURT: I'm sorry. I didn't make my question clear. What are your petitioners doing? Where are they located? What is their present situation?

MR. ARCUDI: Petitioners are in court this morning. They're presently employed by Mrs. Roper at West Redding, Connecticut, and that's where they're living. They are presently employed as domestic servants by Mrs. Roper at West Redding, Connecticut.

THE COURT: I am not at all sure that these matters are relevant, but let me ask them. Are there any criminal proceedings against them?

MR. ARCUDI: No criminal proceedings, and there has been no record of any kind in any country against either of the aliens.

THE COURT: And they are gainfully employed?

MR. ARCUDI: And they are gainfully employed. I also have in process an application to permit them to obtain Employment Service clearance for employment as aliens, domestic servants. That application will not result in any immediate granting of a visa since—unless the law is changed. The visa applications for people of this hemisphere are backed up for 28 months now, so that even if that were approved, that they wouldn't get a visa

on that for at least 28 months because there's such a backlog of approved applications. But I didn't include that in my moving papers because it's not anything of immediate relevance due to that backlog.

THE COURT: All right. Well, I will hear from Mr. Mear. I know exactly what might be here in the background. On the one hand, you're hoping that with some new evidence you might have your clients gain favorable consideration from the Department of Immigration and Naturalization Service, and even if you fail, eventually you have kept them here another eight months or a year, maybe two years, by various motions and stays and appeals; and, even if denied, coming back to the federal court claiming the standards weren't properly exercised; therefore, you give them a reprieve. On the other hand, the Government says this is a stalling tactic; you know, "Where will we be if all aliens are permitted to stay here indefinitely? We should have kicked them out in '68, and they're here all these years. Where is all this going to end? The Court should take a firm stand and uphold the Immigration and Naturalization Service."

So there are these conflicting interests. I think they are recognized by the various courts, district courts and appellate courts.

Do you want to say something else?

MR. ARCUDI: No, I just simply wanted to add, your Honor, as I point out in my brief, I'm sure your Honor's had sufficient of these cases so it's not necessary, but the jurisdiction of the Court over the subject matter is specifically provided for in 8 U.S.C. 105(a)(9) that any deportation proceedings there is the possibility of habeas corpus for a review of the deportation order.

THE COURT: All right, Mr. Mear

MR. MEAR: Your Honor, I'd like to take a moment and simply—and review what has happened with these

petitioners. As pointed out in the petition they entered on May 12th, 1968 on a visitor for pleasure status for one week. When they overstayed that week a deportation hearing was held on October 9th, 1969. You have a copy of that—the order from that. The petitioners failed to take any action to appeal that and the deportation order became final because of failure to go through the appellate rights.

On February 16th, 1970 they were ordered by Immigration and Naturalization to surrender for deportation. They failed to surrender and, as far as Immigration and Naturalization was concerned, they disappeared. They were next located in Connecticut several months later.

Starting November 17th, 1970 there were successive private bills which enabled petitioners to stay in this country, and stays were granted in accordance with those bills.

THE COURT: Who granted those stays?

MR. MEAR: They were granted I believe by the District Director in view of the Congressional action. When, on September 26, 1974, your Honor, the Senate took adverse action on the last of their private bills, they were notified on October 16th, 1974—when I say “they,” the petitioners were notified on October 16th, 1974 that their stay was as of that day revoked and that they would be scheduled to depart—and they were notified on February 6th that they were in fact scheduled to depart on February 19th at ten a.m.—we thereupon get the last-minute flourish of activity by the petitioners to attempt to stay in the country.

I would like to comment briefly on the merits of the motion before your Honor.

THE COURT: What was there about a private bill that influenced the District Director to grant administra-

tive stay that has any less effect than the legal process in a court brought by Mr. Arcudi in behalf of these clients? I mean, the District Director has stated that a senator has put in a bill in Congress, so, "We'll stay the deportation." But when a lawyer presents——

MR. MEAR: I believe the stay was based, your Honor, on the granting of the bills, not on the presentation of the bills.

THE COURT: I thought you said when the bills were introduced, the stay was——

MR. MEAR: I'm sorry. I believe it was when relief was granted on the private bills, when Congress authorized their staying in this country, in order to keep the Immigration and Naturalization Service records clear, stays were granted on the basis of relief in Congress.

THE COURT: You mean that Senator Ribicoff's bills were designed just to grant stays and not to grant them further relief?

MR. MEAR: I'm not sure of the interrelationship here, your Honor, but the stays kept the record clear as far as I.N.S. was concerned. The bill, I am sure, in and of itself would have authority to keep them there. The stays were granted when the private bills were granted.

THE COURT: Mr. Arcudi, maybe you could answer that.

MR. ARCUDI: Yes. There is a long-standing policy of the Service. Originally the policy extended to the Judiciary Committees of both houses that if a member introduced a private bill in order to—the purpose of the bill was to secure a visa for an alien in this country who is not a permanent resident, the Immigration Service had an agreement with the Judiciary Committee of that respective house that it would stay deportation pending action on that bill.

THE COURT: I see.

MR. ARCUDI: Now, that is no longer available to the House of Representative members, but it's still available to the U.S. Senate members.

MR. MEAR: I'm sorry, your Honor.

THE COURT: No. I think you were on the right track. That, in effect, is what you were saying.

MR. MEAR: What we have here, your Honor, is an application to consider alleged new evidence. As your Honor is aware from the original deportation order, the claim of persecution in Haiti was considered in terms of the so-called Papa Doc Duvalier regime in Haiti. I think your Honor can take judicial notice that the Senior Duvalier is no longer in power in Haiti and, in fact, is deceased.

At that time it was determined that the petitioners were not going to be persecuted or had not presented a case for persecution in Haiti. Our claim is that the petitioners haven't presented any new facts other than that another Duvalier is in power there, and maybe if we were to accept at face value everything that has been submitted, then maybe things are as bad now as they were before. But once again, the way they were before is a fact situation which has already been ruled on.

Furthermore, the petitioners have yet to present any evidence that they are in fact—were ever engaged in any political activity in Haiti in opposition to the Duvalier Government. This was a fact situation at page 4 of the original deportation order which the hearing judge, or the fact-finding person found to be relevant in this case, and it appears as if he based his decision primarily on the fact that what was going to happen in Haiti depended on the background conduct and activity of the individual.

We have no new facts, your Honor, to indicate that these petitioners are about to be or are likely to be or

have any cause to believe that they would be the subject of persecution in Haiti.

THE COURT: Mr. Arcudi says he has new facts.

MR. MEAR: Where are they, your Honor? I haven't seen them. It was my impression that we were working with the facts that were attached to the application.

THE COURT: I thought he opened his presentation by saying he has new evidence.

MR. MEAR: Well, it was my understanding, your Honor, that the new evidence are the facts which were attached to the application for rehearing which is an exhibit to the application filed in this court.

THE COURT: Yes. He says, "Herein submitted as Exhibit A is a statement prepared by Mr. Luc Avril telling personally of incidents or pressures he has known about which have caused him to fear returning. They contain new evidence as well as the incidents referred to in the 1969 hearing before Judge Newman."

MR. MEAR: I have read those, your Honor, and I can't see how they tie the petitioner to any kind of political or background activity or conduct which would cause him to have any reasonable fear of persecution.

THE COURT: What if they did?

MR. MEAR: Well, if they did, your Honor, I would point out that the petitioners have a remedy available to them as an application to the President for political asylum. There's been no application made here.

I'd also point out that by the rejection of his private bill I think we can read something into—I'm not sure exactly how much we can read into that, but obviously Congress is not that concerned about persecution in Haiti if they've rejected his private bill.

Your Honor, we have a case where substantially the same facts have been ruled on by a hearing officer in the

Department of Immigration and Naturalization. It's the same set of facts. It's more acts of persecution which may have happened to other people in Haiti for whatever reason we don't know which may in effect show that Haiti is as bad now as it was before. We have a ruling on what Haiti was like before and how that applies to petitioner.

THE COURT: What about the regulation that indicates that a motion to reconsider is deemed withdrawn if there's a departure?

MR. MEAR: It's just mooted, your Honor. There's no way—once they've left the country the case is closed.

THE COURT: Is that fair? I mean, on the one hand the regulations say, "You may make a motion to reconsider—" and I suppose most of them are frivolous, but some aren't.

MR. MEAR: Yes, your Honor. That regulation—

THE COURT: All right. But if a judge doesn't stay the deportation, the motion to reconsider is deemed moot and maybe some valuable new evidence—

MR. MEAR: I think your Honor has to rule on what you have before you, and I can't see that any evidence valuable or otherwise has come in that can—

THE COURT: Do you think I make that determination? That I can say—

MR. MEAR: Well, I'd say—

THE COURT: Hold on, Mr. Mear—that I should say to the Department of Immigration and Naturalization that as I read the new evidence it seems relevant and weighty and, therefore, I should grant a motion to stay?

MR. MEAR: No, your Honor.

THE COURT: And Mr. Arcudi goes back to the Naturalization Department and says, "Look, a federal judge says they're weighty and relevant and, therefore,

it's something that a Naturalization examiner should give great weight to." On the other hand, if I say the evidence has no weight and it seems frivolous, would a Naturalization examiner not say, "Well, the federal judge really doesn't handle a lot of these matters and to me these facts are weighty and significant?"

MR. MEAR: Well, I think, your Honor—I'm not sure that——

THE COURT: I hesitate, Mr. Mear, to base my ruling on whether to stay this case on my judgment as to whether these new facts are relevant and weighty.

MR. MEAR: Well, isn't your Honor saying that you have to grant application in all situations? I think that that's clearly not——

THE COURT: This is what is troublesome here, I grant you this. On the one hand the Department at times can feel completely frustrated because the aliens who are here illegally have various steps and an astute lawyer can take them right through every step of the way to keep them here, sometimes four and five years, and you reach a point where it gets very discouraging. On the other hand, a federal judge sits here and says, "Well, a lawyer stands up and says, 'We do have new facts, we do have new evidence. It is, in our opinion, weighty. We might influence the Department to grant these people some relief, and if you don't give me a stay, they have been here six or seven years, so what's another 18 months or another 8 months? If you don't grant me a stay, I won't even have a chance to present this.'" So these are the things that go on in my mind as I sit on these cases. This is not the first one I have had, and I try to weigh these factors.

After all, there are two people sitting in this courtroom, they can be deported out of this country tomorrow,

and I have to say in my mind all that they're asking for is an opportunity to be heard.

Now, if your motion to reconsider could be somehow argued or presented and not deemed moot, then you feel somewhat differently about it. It's almost like saying a person had a right to an appeal, but if he's incarcerated after sentence, the appeal is deemed moot. So counsel comes in and asks for a stay of incarceration to give the defendant an opportunity to appeal.

MR. MEAR: Your Honor—

THE COURT: You have to be kind of hard-pressed not—

MR. MEAR: First of all, I think a Court has a responsibility to look at the petitioners that come in and to cull out those which are frivolous and those which are—have any substantial likelihood whatsoever of going on and making any kind of an imprint on the administrative process. I think that your Honor's concerned about Section 103.5 which provides that motion for reopening or reconsidering can be filed, but if they're out of the country, it's deemed withdrawn. I think, first of all, that it should be clear that this is not an appeal. Your Honor, they had their right of appeal, they did not satisfy their of appeal. This is a motion to reopen and reconsider, and I think if your Honor is thinking in terms of due process, I don't think due process applies whatsoever. If you're thinking in terms of fairness, the reason for this kind of—and ending to this section, which requires—which does not allow this section—motions under this section—to stay the rehearing date, is to prevent—is to prevent these motions to be filed at the last minute as we have right here, your Honor.

THE COURT: I understand that, Mr. Mear. Why give them the right to file such motions, then? Why give—

MR. MEAR: I think what they're giving them is a right to file a timely motion, and I don't see anything wrong with that. I don't see how that's unreasonable at all.

Your Honor, if we have a stay here we're into a situation of—Mr. Arcudi himself said—a period of eight months, and when we add this eight months on, the petitioners do have certain rights after seven years.

THE COURT: When was the last Congressional act performed?

MR. MEAR: September 26th, 1974.

THE COURT: So, in your mind, they could have filed September 25th, 1974, this motion, is that it?

MR. MEAR: Absolutely. I think, to make it even clearer, we notified them that the stay was up as of October 16th.

THE COURT: Then what happened on October 16th?

MR. MEAR: On October 16th they were notified that the stay which was granted in accordance with the private bills was up, the stay was no longer in existence.

THE COURT: Yes.

MR. MEAR: As of that date there should have been no doubt whatsoever as to what was going to happen to the petitioners.

THE COURT: How did they stay in this country from October 16th to February 18th?

MR. MEAR: Well, arrangements are being made to actually deport them.

THE COURT: How does that work out?

MR. MEAR: Plane tickets, the passport, the actual administrative and physical apparatus to remove them from the country. The passports and the tickets and the arrangements being made administratively.

THE COURT: All right. Now, Mr. Arcudi presents a very strong argument, saying that you held this up merely for the purpose of delay and that, in effect, it doesn't show good faith and that you are carefully gauging your moves so that each step of the way is taken at the very last moment to keep these people here as long as possible and, secondly, he asked the Court—which I hesitate to do—but he's asked the Court to look into the merits of your claim to see if justice requires equitable action by this Court. What is your answer to both of those?

MR. MEAR: Well, these aliens were not notified of the unfavorable acts of the bill until October 16th, not September, when it took place, the Service notified them at that time, so that there's been a period of some three and a half months since the Service notified that the stay of deportation that had been entered was lifted in October. Their actual order of deportation didn't come until February 6th, to be exact.

THE COURT: Go over that a little bit more slowly. On October 16th, '74 they were notified that they were going to be deported on February 18th?

MR. ARCUDI: No. They were notified that the stay of deportation that had been holding them here because of the Senate bill was no longer applicable since the Senate bill had been acted upon adversely. That was the notification of October 16th. On February 6th they were notified that they were going to be deported February 19th. In October—in other words, they weren't given a specific date of deportation, they were told that the relief that we have afforded up until now in staying deportation because of the bills is no longer applicable. So that deportation is now reinstated, but there was no definite date. The definite date didn't come until February 6th. These aliens were represented by other counsel, and they

came to see me toward the end of December, and I have spent that month, the month of January, in assembling evidence preparatory to making this motion. And the evidence that I have assembled refers to incidents in '72, it refers to clippings from a French Haitian newspaper in New York City of March, 1974, January 17th, January 24, '75. So that they're all incidents that occurred after 1969, and they are incidents—one of the incidents, for instance, the 1974 incident was reported in the English language press, but I cited the clippings from the French language press because it was clippings that would come to the knowledge of these people who are French speaking and would be part of their fear, which is a state of mind, of being returned to Haiti.

The '74 incident is a person in Florida about to be deported by the Immigration Service who committed suicide when he was being detained for deportation to Haiti.

THE COURT: What has that all got to do with these particular people?

MR. ARCUDI: Well, it has to do—first of all, it's new evidence since '69; it occurred in '74. It has to do with these people because one of the allegations is that the return to Haiti, after being out of Haiti, being in a free country, people are suspicious. The Haitian regime is very oppressive, is suspicious of people coming back from a free country, and I demonstrate that their fears are such that one of these persons about to be deported actually committed suicide. That's fairly—to me—a fairly dramatic evidence of a fear of returning.

THE COURT: Oh, there could be a lot of reasons for people committing suicide.

MR. ARCUDI: He was being detained by the Immigration authorities for deportation and he committed suicide in he cell prior to being deported the next day.

THE COURT: What exactly do you wish the Immigration Department to say? That no Haitian could ever be deported from this country because when they get back, whether they are non-political or pro-government or anti-government, that the mere fact that they have been out of the country they are looked upon with suspicion and a fortiori no Haitian should ever be deported?

MR. ARCUDI: I don't ask the Immigration Service to take that stand, that's a stand they took similar to the one that they took with respect to Cubans. However, the Cuban refugee from the Cuban political regime is—very few questions asked and he is not—he is permitted to seek asylum. Here, I don't think that the seeking asylum that the Cubans can do is permissible to the Haitians. This is why I ask the withholding of the deportation be considered rather than seeking of asylum, which has the same effect administratively, because Mr. Mear talked about why we didn't apply to seek asylum. The Cubans may seek asylum because of fear of returning to the regime. As a matter of fact, this was an article in the New York Times last week that referred to the fact that there is great feeling among the Haitians that the white refugees from a leftist regime in Cuba are permitted in here seeking asylum without the asking of questions, while black refugees from a rightist regime in Haiti, the Immigration Service handles their cases with much more analytical questioning.

I mean, I'm not saying that that proves it, because it was in the New York Times last week, but it is an area that the Immigration Service is aware of, that the Immigration Service has been challenged on, that there is oppression in Haiti, that people, such as this case here, although the case of Mr. Avril's brother was considered by Immigration Judge Milner in 1969, and he didn't find that the possible political oppression of the

brother was applicable to Mr. Avril, I claim with the evidence of new incidents of oppression in Haiti plus the evidence that Mr. Avril's brother before '69 was involved, brings the possibility of oppression more closely to him and, therefore, I'm asking the Immigration Service to reconsider since the thrust of the '69 decision was that, yes, there may be oppression in Haiti, but how do we know it applies to him.

THE COURT: That is what I am asking. The very same question.

MR. ARCUDI: Well, there was an incident that Mr. Avril brought before the judge in '69 concerning his brother, that his brother had to flee the country.

Now, Judge Millman didn't feel that that by itself was sufficient. I'm making the application on the theory that that incident plus the accumulative new evidence does justify the fear that Mr. Avril fears of returning to Haiti. It is not in vacuo that I'm asking that all Haitians who have stayed in the United States for a length of time should be free from being deported there because of 243(h), there is some evidence that this man's family is directly involved, and this man's acquaintances in the affidavit which I made Exhibit A in my attachment to the Immigration Service motion.

So, I feel—first of all, I don't think there was laches, because I didn't come into this case until Christmas-time and I needed the month in order to get this together. Plus, that there wasn't an actual order of deportation until February 6th, an actual date of deportation—I'm sorry, there was an order of deportation in 1969—and I feel it is evidence that occurred since '69, which, combined with the evidence that—already in the record in '69, has a sufficient basis for being related to this man's fear of returning to Haiti.

That's, really, the summary of my position.

THE COURT: Aside from this Court's power to grant a stay, what other agencies or officials can give you a stay? Is this your last resort? Can the Department of Immigration—

MR. ARCUDI: If it's opened? If my motion is reopened, it's granted. It doesn't have to be adjudicated, just—the proceedings are reopened. Then the Immigration judge who grants the reopening has the power to grant a stay. But he won't act on it for probably another month.

THE COURT: Tell me about that, now? You mean there's going to be a judge that's going to take a look at your moving papers and decide whether the case should be reopened?

MR. ARCUDI: Right.

THE COURT: If—at least in your opinion—he decides it should be reopened, then he has power to stay their deportation?

MR. ARCUDI: That's correct.

THE COURT: Is that correct?

MR. ARCUDI: Right.

THE COURT: If he decides that your moving papers do not merit a reopening, then what happens?

MR. ARCUDI: Then the Board of Immigration Appeals has power to stay. That's in Washington. That's the top appellate administrative agency.

THE COURT: What are you asking me to do today?

MR. ARCUDI: I'm asking you to stay so I can explore my remedies in the administrative process.

THE COURT: : Well, that could be—

MR. ARCUDI: Well, I mean, I already have a motion in, so that I can follow this motion through the administrative process.

MR. MEAR: Your Honor.

THE COURT: Go ahead, Mr. Mear.

MR. MEAR: As far as the administrative process is concerned, I'd like to point out that probably a much—greater than eight months that Mr. Arcudi has suggested, that apparently after seven years residents have certain rights for application for suspension of deportation if you have been here for seven years and that starts another whole set of applications and another whole set of appeals.

The Court: I kind of figured that. Let me throw something out. I really recognize both sides here, it is just that I hesitate to have someone deported when there might be just a glimmer of hope for them, particularly since at least a senator of the United States, a well-recognized, eminent person in our community felt this had some merit, because he did introduce three bills and, in effect, single-handedly kept these people here for some years, and an attorney comes in and says, "I have been on the case for a month or so, and I have new evidence." Yet Mr. Mear is saying, "If you grant this motion, it has ramifications that even the Court wasn't aware of." That is, if I grant a motion to stay until final administrative procedures are completed. I suppose the regulations are filed with administrative procedures. So, I hesitate to issue a broad motion to stay, but I am inclined to grant the motion to stay pending the Immigration judge's ruling on the pending motion before him.

Mr. Arcudi has said to the Court, "I just want an opportunity to be heard before the Immigration judge." So I am saying, in effect, O.K., I'll give you that opportunity, but if you are going to use my order to go off on some other administrative channels that involve another whole set of circumstances not before the Court, I am not going to allow that. I think justice will be done. Because then the Immigration judge will then have the opportunity to determine whether in fairness and in

justice he should issue a stay after he examines your moving papers. Or, if he doesn't, then you have the Immigration Department to seek help from.

I think under all the circumstances the Court will grant the stay pending the Immigration judge's ruling that is presently before him in Hartford on the motion to reconsider and reopen.

AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

Pauline P. Troia, being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
2 copies

20th day of June 19 77 s he served ~~a copy~~ of the
within govt's brief and addendum

by placing the same in a properly postpaid franked envelope addressed:

Victor M. Ferrante,
285 Golden Hill St.
Bridgeport, Conn. 06604

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

20th day of June, 19 77

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1979